MUNICIPAL CORPORATION, HYDERABAD

v.

SUNDER SINGH

(Civil Appeal No.3627 of 2008)

MAY 16, 2008

[S.B. SINHA AND LOKESHWAR SINGH PANTA, JJ.]

Code of Civil Procedure, 1908 – Or.41, r. 23 – Remand by Appellate Court – Scope of – Held: Is extremely limited – Order of remand cannot be passed on ipse dixit of the Court – Or.41, r.23 is invoked when a decree has been passed on a preliminary issue and the Appellate Court disagrees with the findings of Trial Court on the said issue – Power thereunder not to be exercised by Appellate Court only because it finds it difficult to deal with the entire matter.

Respondent filed suit seeking grant of permanent injunction in respect of property and a direction upon the Appellant-Corporation to render accounts for the amounts realized by wrongful auction of the said property. An interlocutory application was filed therein for adducing secondary evidence of documents. The application was dismissed. Thereafter, the said suit was also dismissed, appeal whereagainst was filed. The High Court allowed the appeal and remanded the matter back to Trial Court. Hence the present appeal.

Allowing the appeal and remanding the matter back to High Court for consideration of the appeal on merits, the Court

HELD:1.1. Or. XLI, r.23 of CPC would be applicable when a decree has been passed on a preliminary issue. The Appellate Court must disagree with the findings of the Trial Court on the said issue. Before invoking the said provision, the conditions precedent laid down therein

A must be satisfied. [Paras 10, 11] [642-B,C,D]

1.2 The Court should loathe to exercise its power in terms of Or. XLI, r.23, CPC and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with
B the entire matter. If it does not agree with the decision of the Trial Court, it has to come with a proper finding of its own. The Appellate Court cannot shirk its duties. [Para 11] [642-D,E]

C 1.3. The scope of remand in terms of Or.XLI, r.23 is extremely limited. In the present case, the suit was not decided on a preliminary issue. Or. XLI, r.23 was therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set
D aside the orders refusing to adduce secondary evidence. Or. XLI. r.23A of CPC is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Or. XLI,
E r.23 of CPC. An order of remand cannot be passed on *ipse dixit* of the Court. [Paras 19, 20] [650-G, 651-A,B,C]

Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & anr. (Civil Appeal No. 3495 of 2008) disposed of by
F S.C. on 12-5-2008 – referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3627 of 2008

From the final Judgment and Order dated 8.4.2004 of the
G High Court of Judicature, Andhra Pradesh at Hyderabad in C.C.C.A. No. 64 of 1998

L.N. Rao, G. Ramakrishna Prasad, Suyodhan Byrapaneni, Siddarth Patnaik and G. Arun for the Appellant.

M.N. Rao, Promila, A. Ramesh and Anshuman for the Re-
H

spondents. A

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. This appeal is directed against a judgment and order dated 8.4.2004 whereby and whereunder the High Court of Judicature at Hyderabd set aside the judgment and order dated 24.4.1998 passed by the VII Senior Civil Judge, City Civil Court, Hyderabad in O.S. No. 573 of 1991 and remanded the matter back to the learned trial judge. B

C

Devi Singh is the predecessor-in-interest of the respondent. The original dispute between the parties centered round 1250 square yards of land purported to be situated in a market called 'Maidan Bazaar Jamerath' situate at Karvan Aspan and bounded on the east by canal and police station, on the west by 'Bakar Mandi, on the north by cement road, graveyard and huts belonging to the plaintiff and on the south by land, huts and graveyards belonging to the plaintiff. It was said to be the ancestral property of the plaintiff and was owned by him having been purchased by his ancestors. D

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In the said suit, Devi Singh sought for permanent injunction restraining the appellant herein from interfering with his peaceful possession and enjoyment over the said property. The said property consisted of open land.

The said suit was decreed on or about 9.4.1960. An appeal was preferred thereagainst by the appellant, which by a judgment and order dated 16.2.1967 was allowed by the High Court of Andhra Pradesh. F

3. Devi Singh preferred an appeal before this Court. The fact of the matter has been discussed in details by this Court in a judgment reported in *Devi Singh v. Municipal Corporation, Hyderabad* [(1973) 4 SCC 66]. G

From a perusal of the said judgment, it appears, that a purported claim was made by Dhan Singh over 2750 square H

A yards bearing Survey Nos. 5943 and 5944 situated at Karwan Aspan on the premise that he had filed an application before the competent authority in the year 1921 stating that the same had fallen into the prohibited area. Indisputably, the property involved in the said suit had been acquired and compensation B had been awarded to Dhan Singh for 1250 square yards and not for the entire plot of the area which is said to be 2750 square yards. This Court found that the plot for which compensation had been paid to Dhan Singh for an area of 1250 square yards was far removed from the Bazaar and there were several other C plots which intervened. It was furthermore noticed that it was somewhat difficult on the present state of the record to reconcile the case of the defendant Corporation that the entire area covered by the sale deed had been acquired for which compensation had been paid to Dhan Singh with the relative situation of the Bazaar and the plot measuring 1250 square yards. It D was held:

> 15. It is difficult to ignore the entire proceedings before the Sarfe-Khas and the documentary evidence according to which possession was given of the land or the property E including the Bazaar by the Sarfe-Khas to the plaintiff after a full investigation of his claim in the matter. There was no allegation that all those proceedings were without jurisdiction or were collusive although it has now been suggested before us on behalf of the defendant F Corporation that the Sarfe-Khas Department had ceased to exist in February 1949 by virtue of the Sarfe-Khas Merger Regulation 1358 Fasli. There is no indication in the orders of the various authorities including that of the Minister that the Sarfe-Khas had ceased to have any jurisdiction about G deciding whether the property over which the Sarfe-Khas laid claim was the property of a private individual or was part of the personal estate of the erstwhile Nizam of Hyderabad.
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> 16. It has been maintained before us on behalf of the H plaintiff that the orders made by the Sarfe-Khas were

admissible and relevant under Section 13 of the Evidence Act. These points were not gone into by the courts below and have still not been decided and we do not wish to express any opinion on them. The agreements to which reference has previously been made by us and which were not produced by the Corporation before the trial court would have also thrown a good deal of light on the points in controversy. In our judgment this is a fit case in which a remand is necessary to the trial court. The trial court shall decide the matter afresh only on issues relating to title and possession of the parties with the exception of such legal points which have already been disposed of by us. Both the parties will be at liberty to ask for such amendments in the pleadings may be strictly necessary for clarification on the question of title and possession. But no such pleas will be allowed to be introduced which may change the nature of the case. Fresh evidence can also be adduced confined only to these two matters by both sides. It will be for the trial court to get a complete investigation made with regard to the various matters already mentioned by us by a Commissioner if any of the parties make an application in that behalf. Both sides have expressed willingness to produce before the trial court all such documents which are relevant and which are in existence to enable the court to dispose of the question of title and possession of both the parties in a satisfactory manner.

4. Devi Singh died. Thereafter, his heirs and legal representatives were brought on record. Admittedly, no amendment had been sought for pursuant to or in furtherance of the observations made by the Court. Parties, however, adduced additional oral and documentary evidence.

5. The suit was again decreed in favour of the respondents. Thereagainst, an appeal was preferred which was marked as C.C.C.A. No. 112 of 1975. By reason of a judgment and order dated 20.7.1979, the said appeal was allowed. No

A further appeal was preferred thereagainst. It, therefore, attained finality between the parties.

6. Respondents herein, however, on or about 3.6.1991 filed O.S. No. 573 of 1991 for title and possession of the property, the description whereof is as under:

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"SCHEDULE OF PROPERTY

All that the property admeasuring sq. yards situated at Jumerath Bazar, Hyderabad and is bounded by

C North : Plaintiff's property and Main Road (cement);

South : Remaining property of the plaintiff;

East : Nalla and Plaintiff's property;

West : Remaining property of plaintiff.

D

7. A decree was prayed for grant of a permanent injunction and a direction upon the respondent – Corporation to render accounts for the amounts realized by wrongful auction. Admittedly, an interlocutory application was filed therein for adducing secondary evidence of documents purported to have

E been marked in the said O.S. No. 7 of 1959.

The said application was dismissed. By a judgment and order dated 24.4.1998, the said suit was dismissed. An appeal was preferred thereagainst which by reason of the impugned

F order dated 8.4.2004 has been allowed and as noticed hereinbefore, remitted to the trial court..

8. Mr. L N. Rao, learned Senior Counsel appearing on behalf of the appellant would submit that keeping in view the earlier round of litigation the findings of the fact arrived therein

G must be held to have attained finality and thus the High Court has committed a grave error in setting aside the judgment of the learned trial judge and remanding the matter back to it. It was urged that in the earlier round of the litigation not only the question of title but also possession having been gone into in

H respect of the self same property, the impugned judgment should

not have been passed. A

9. Mr. M.N. Rao, learned Senior Counsel appearing on behalf of the respondent, on the other hand, would contend that having regard to the provisions contained in Order XLI Rule 23 of the Code of Civil Procedure as amended by the State of Andhra Pradesh as also in view of the fact that the properties are different, the second suit was maintainable. It was urged that as some vital documents had been missing, a prayer was made for adduction of secondary evidence in respect of the documents which had been relied upon by the appellant – Corporation in the earlier suit itself. B C

It was pointed out that by an interim order dated 27.8.1998, the appellant – Corporation has been receiving a sum of Rs.5,000/- per week from the respondent and thus this Court may not exercise its jurisdiction under Article 136 of the Constitution of India. D

Order XLI Rule 23 of the Code reads thus:

> "**Remand of case by Appellate Court.**—Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand." E F G

The amendment which is applicable for the State of Andhra Pradesh is same as that of the State of Madras, which reads as under:

"(a) After the words "the decree is reversed in appeal", H

A insert the words "or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case"; and

(b) delete the words "if it thinks fit", occurring after the B words "the Appellant Court may"."

10. Order XLI Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. C Only when a decree is to be reversed in appeal, the appellate court considers it necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the appellate court.

11. It is now well settled that before invoking the said provision, D the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order XLI Rule 23 of the Code of Civil Procedure and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only E because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

12. The issues which were framed by the trial court are as F under:

"1. Whether plaintiff has got title to the suit property?

2. Whether plaintiff is entitled to recover possession of the property shown in green colour of the plaint rough G sketch?

3. Whether the defendant is liable to render accounts?

4. Whether plaintiff is entitled for injunction in respect of the vacant site of 2790 square yards?

H

5. Whether the suit is not maintainable? A

6. To what relief?"

13. The High Court noticed the contentions of the respondent that the trial court ought not to have rejected the interlocutory application for adduction of secondary evidence. It was contended that a second suit was filed only because despite liberty granted by the Supreme Court, the plaint was not amended. Even therefore, the scope of amendment was limited. No new case was to be made out. B

14. The High Court framed the following question for its consideration, namely, as to whether it is just and proper to look into the merits of the case in the absence of secondary evidence sought to be adduced by the plaintiff. C

While upholding the contentions of the appellant that it was not open to the respondent to file a present suit and even if the documents are taken into consideration the same would not create any difference of opinion before the trial court, having regard to the binding nature of the judgment of the High Court, it was held: D

> "I am of the opinion that though there is a force in the contention of the learned counsel for the defendant, but the fact remains that the trial Court also relied on some of the earlier documents mentioned in CCCA No.112 of 1975 without receiving them into evidence." E F

It was furthermore opined:

> "It is not just and proper to deal with the merits of the case as it may act adversely to the interest of her respective parties. I am of the view that the present suit was filed for declaration of the title in respect of the Item No.1 of the plaint schedule of properties and for recovery of the possession of mesne profits. It is stated that item No.1 of the suit land was covered by the Jumerath Bazar and Devi Singh has lost the title in respect of 1250 square yards as G H

held in the earlier litigation filed for injunction. The title of the Devi Singh in respect of the other property was not at all decided in the earlier suit and it is the case of the plaintiff that unless Exs.B-1 to B-80 and Exs. X-1 to X-47 documents which are printed book filed before the Supreme Court are received as secondary evidence, it will amount to deprive the valuable right of the plaintiff to lead secondary evidence to substantiate his contention in the plaint. The trial court having rejected the request of the plaintiff to lead secondary evidence, held that barring exhibits filed in the suit, the plaintiff did not file any documentary evidence either with regard to his possession or with regard to any part of the suit schedule property or about his possession in 1940 or delivery of possession by the M.C.11 as contended by him and the judgment in CCCA No.112 of 1975 has become final. The Trial Court further held that the plaintiff has not filed a scrap of paper to establish his possession in respect of item 'A' of schedule property of 2790 square yards."

It was furthermore opined:

"The documents sought to be filed cannot be marked by this Court in view of the disputed facts and the said documents have to be marked by way of adducing secondary evidence, which will subject to the objections and cross-examination by the defendant. Therefore, I am of the opinion that it is a case to remand to trial Court. It is just and proper for the trial Court to consider the request of the plaintiff to receive the secondary evidence in accordance with law. Therefore, it is just and proper to mark the documents, relied on by both the parties in the earlier suit and consider the same which were already considered by this Court in CCCA No.112 of 1975. If authenticity of any of the documents in the book prepared by the Supreme Court is doubted, it is always open for the defendant to take an objection and also confront the said document to the witness of the plaintiff.

I am of the view that an opportunity should have been given to the plaintiff and the plaintiff cannot be thrown out from giving an opportunity in the peculiar facts and circumstances of the case to lead secondary evidence and therefore, without going into all other questions and without expressing any view on the merits of the case, I am of the view that it is just and proper to remand the matter to permit the plaintiff and also the defendant to lead secondary evidence in respect of the documents sought to be filed by them." A B

With respect, the approach of the High Court was not correct. It for all intent and purport failed to perform its duties. C

15. In the earlier round of the litigations, the Division Bench of the High Court arrived at its own conclusion. One of the questions which fell for consideration of the Division Bench was as to whether as regards the identity of the land acquired by the City Improvement Board and to determine whether Dhan Singh had been paid compensation for whatever land he had been possessing, it was held: D

"Ex.D-5 passed by the Compensation Court in the year 1915, Dhan Singh did not make any other claim for compensation. This will probabilise that if really he was owning any greater extent of property, he would have claimed compensation such large extent of property as well. The absence of such a claim is a strong probability that he was not owning any land in excess of 125 (*sic for 1250*) sq. yards, for which compensation was provided and paid to him. Dhan Singh made a claim for some plot bearing No.5945/D adjacent to the slaughter house under Ex.D-10. He would appear to have also filed a plan along with the petition but the identity of that plenary is left obscure. There is no evidence in identification as to how the claim made under Ex.D-10 was but however claimed that Dhan Singh made an admission even then that the plot bearing No.5945/D was also within the prohibited areas." E F G H

16. The standard of proof applicable in a civil suit is the preponderance of probability. The question had been determined having regard to the fact that the predecessor-in-interest of the respondent confined its case only to 1250 square yards of land. The effect of the judgment of the earlier suit has been taken note of. The High Court furthermore noticed the contention that Dhan Singh should have been paid compensation for the entire 2750 square yards of land, but the fact remains that they had never claimed any compensation for any land beyond 1250 square yards and in the said factual backdrop, it was held:

> "We have carefully analysed the evidence regarding possession which consists of both documentary and oral evidence. These documents relate to the period 1928 to 1954. Ex.D/7 of the year 1928 gives indication that the Sarfekhas was collecting some rents on the Jumerath Bazar area and the City Improvement Board was requesting the Sarfekhas Authorities to hand over all such rents collected by them, and they have also informed the Sarfekhas that the property belonged to the City Improvement Board. In the year 1929, some merchants in hide sand skins would appear to have been using portion of the land on the bank of the river Musi for conducting their trade."

Upon considering the entire documentary evidence, it was held:

> "The Sarfekhas was evidently proceeding on the basis that the suit property was part of Kivan Jung and the City Improvement Board was claiming that all rents realized from Zumerath Bazar should be credited to the accounts of the Board. It is no doubt true that in Ex.X-1 reference is made that the Chowda Bazarath was handed over to the Municipality in the year 1946, but it looks to us that the suit property would not have been a part of this Chowda Bazar for two reasons. The first reason is that it was specifically mentioned as a separate item when the contract was given

to Fateh Mohammad and no reference was made at all to Jumerath Bazar in the contracts given either to Shaik Dawood or Shaik Yakub Saheb. Secondly Ex.X/1 include the suit property as a separate item under the list of gardens and lands. In the oral evidence, it is no doubt elicited, that this Jumerath Bazar is included as one of the Chowda Bazarath and that these markets was handed over to the Municipality in the year 1946 under the agreement executed between the Sarfekhas and the Corporation. It is argued for the respondents that an adverse reference should be drawn against the Corporation for not producing the agreement. It is also contended that the circumstances would negative the title put forward on behalf of the Corporation. We find no substance in either of these contentions. In Ex. X-1, itself a remark was made that notwithstanding the execution of agreement between the Corporation and the Sarfekhas authorities, the Corporation has not been paying any amount ever since the amount came into existence. That would indicate that the agreement was not acted upon by the Corporation so far as at least the suit property is concerned. In the nature of things when the title of the property belonged to the Corporation after it was handed over to its management by the City Improvement Board, the suit property would not have been mentioned in the agreement referred to by the plaintiffs. The oral evidence discloses that the original agreement is with the Sarfekhas authorities to produce the records. The original agreement is with the sarfekhas. It was the plaintiff that summoned the sarfekhas authorities to produce the records. The original agreement available with the sarfekhas has not been produced. No adverse inference can therefore, be drawn against the Municipality that it has no title to the property or that it recognized the title of sarfekhas to the property. We have earlier stated that the plaintiff did not claim title to the property through the Sarfekhas and that even the sarfekhas authorities, who claimed title to the

A property as forming part of the Kivan Jung, have given up their claim by about the year 1949."

The Division Bench furthermore took into consideration the fact that the acquisition took place long time back and thus some papers might have been lost or removed and the absence B thereof in the file could not throw any suspicion on the authenticity of the vesting which took place during those years. The Division Bench concluded its judgment, stating:

"We have earlier given reasons that it was the corporation C that was in possession of the property and not Devi Singh was making efforts to come into possession of the property by making false assertion that he was the owner of the property and that his property was extending upto the police station challenging the east. The circumstances remains to that though he filed the original sale deed Ex.P.12, he D has not produced the plan attached thereto in this suit. We are not satisfied that the said plan continued to remain in possession of the Serfekhas authorities before whom he would appear to have produced it. When he is having the custody of Ex.P.12 original, the normal presumption is E that he would also be having custody of the plan which formed part of Ex.P.12. The suit for injunction was filed by Devi Singh shortly after the proceedings under Sec.107 Cr.P.C. initiated against him ended in his favour and it is common ground that ever since he filed the suit, interim F injunction issued in his favour has been in force. Any act of possession after the issue of the said interim injunction will not assist Devi Singh's claim to have been in possession of the property on the date of the suit in any manner.

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The plaintiffs have not therefore established their title to the property. They have not also proved their possession in the suit property on the date of the suit. The order passed by the Sarfekhas Authorities are invalid and do not bind the Corporation in any manner. It is true that the corporation

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has proved effectively possession of the property only from the year 1946 but they have established their title to the property. The plaintiffs who have no title to the property cannot get any injunction against the Corporation who is the real owner of the property even if it were to be assumed that the plaintiffs were in possession of the property on the date of the suit. The acts of possession indulged in by the plaintiffs are fugitive in character and do not establish their possession in any manner."

17. The learned trial judge in its judgment and order dated 24.4.1998 in O.S. No. 573 of 1991 referred to in extenso the earlier judgment of the High Court to arrive at the following finding:

"After discussing the various aspects it was held that in 1915 Dhan Singh did not make other claim except in respect of 1250 sq. yds. relating to the lands bearing Nos.5943 and 5944 in respect of compensation. This will probablise that if really he was owning any greater extent of property, he could have claimed compensation for the larger extent of property as well. The absence of the such a claim is a strong probability that he was not owning any lands in excess of 1250 sq. yds. for which compensation was provided and paid to him. Though Dhan Singh made a claim for some plot bearing No.5945/D adjacent to the slaughter house; he made an admission that the said plot was also within the prohibited area. It was further held that the fact remains even if Dhan Singh had any title to the plot bearing No.5945/D it became extent (sic) when it was acquired by City Improvement Board in about the year 1920. Dhan Singh made claim stating that the extent involved in his property Nos.5943 and 5944 was 2750 sq. yds. and not 1250 sq.yds. and that the compensation court was not correct in deducting the amounts towards nuzul."

It furthermore held that the property covered by Exh. A-8 was only 1250 square yards and nothing more and the claim of

A the plaintiffs in the said suits with regard to 5410 square yards appeared to be highly improbable. It was furthermore stated:

> "If Dhan Singh who was claiming under Ex.A8 previously only 2750 sq.yds. in property Nos.5943 and 5944 as against 1250 sq.yds. fixed by the compensation court and
B when the claim of 2750 sq. yards was disallowed confining his right to 1250 sq. yds. was acquired by City Improvement Board and compensation was paid to Devi Singh, the father of the plaintiff's is not in dispute."

C The learned trial court furthermore considered the evidence of the plaintiff who examined himself as PW.2 stating:

> "According to him suit property is 5410 sq. yds. out of which the black colour area admeasures 2790 sq. yards which is in his possession and the green colour portion
D was forcibly occupied by the Municipality. The red colour portion also belongs to him. He admitted about previous litigation and the decree passed in O.S. 7/59 and the same being set aside under Ex.B-1 by the High Court. According to him Nizam Government took away his
E property from his ancestrals somewhere in 1940's subsequently the property was released. It is pertinent to mention that he did not file any documents."

18. Noticing that neither the original plaintiff nor the respondents who were substituted in place of Devi Singh had not
F amended the plaint in the previous suit, it was held that the evidence on either side is very meagre in the said suit. The said suit was held to be barred under Order II Rule 2 stating that the plaintiff ought to have prayed for the declaration in the previous suit itself.

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19. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order XLI Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order
H XLI Rule 23 was therefore not available. On what basis, the

secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence. A

20. Order XLI rule 23A of the Code of Civil Procedure is also not attracted. The High Court had not arrived at a finding that a re-trial was necessary. The High Court again has not arrived at a finding that the decree is liable to be reversed. No case has been made out for invoking the jurisdiction of the Court under Order XLI Rule 23 of the Code. B

An order of remand cannot be passed on ipse dixit of the court. The provisions of Order II Rule 2 of the Code of Civil Procedure as also Section 11 thereof could be invoked, provided of course the conditions precedent therefor were satisfied. We may not have to deal with the legal position obtaining in this behalf as the question has recently been dealt with by this Court in *Dadu Dayalu Mahasabha, Jaipur (Trust) v. Mahant Ram Niwas & anr.*(Civil Appeal No. 3495 of 2008) disposed of on 12.5.2008. C D

21. We are, therefore, of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remanded back to the High Court for consideration of the appeal on merits. The appeal is allowed with the aforesaid directions. E

In the facts and circumstances of the case, however, there shall be no order as to costs. F

B.B.B. Appeal allowed.